

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

TYRONE CURTIS,

Defendant-Appellant.

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UNPUBLISHED

June 21, 2005

No. 254617

St Clair Circuit Court

LC No. 03-001961-FH

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant appeals by right his conviction after jury trial of third-degree criminal sexual conduct. MCL 750.520d. Defendant argues that he was denied a fair trial by the prosecutor's remarks. He also argues that scoring offense variables in Michigan's sentencing guidelines to enhance his sentence beyond that established for the offense of which he was convicted and for his prior criminal record violates his Fourteenth Amendment right to due process and his Sixth Amendment right to a jury trial. We find defendant's arguments unpersuasive and affirm.

"We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Defendant failed to preserve his claim of prosecutorial misconduct by contemporaneously objecting to the remarks in question and requesting a curative instruction. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Our review is therefore limited to plain, outcome-determinative error that results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of the guilt or innocence of the accused. *Id.*; *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

Defendant first argues that the prosecutor posed the following improper question and answer during rebuttal closing argument: "Now ask yourself, did [the victim] seem to be making an honest effort to tell the truth? Absolutely." Defendant asserts this comment amounted to improper vouching for the credibility of the victim on the basis of "special knowledge." Although we agree that the prosecutor may not personally vouch for the veracity of her witnesses on the basis of evidence withheld from the jury, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), we disagree that is what occurred here. The prosecutor's comment must be placed in context, *Watson*, *supra* at 586, and in doing, so we conclude the prosecutor's rebuttal

argument was a response to a defense attack on the victim's credibility. The comment was immediately preceded by the prosecutor's statement:

When we talk about credibility of witnesses, ladies and gentlemen, you will be given the instruction: *How did the witness look and act, act while testifying?*

*Did the witness seem to make an honest effort to tell the truth or did the witness seem to evade the questions or argue with the lawyers?*

The trial court, in fact, instructed the jury before it began its deliberations that in deciding whether to believe the testimony of a witness the jury could consider the factors included in the italicized portion of the prosecutor's remarks. See CJI2d 3.6(3)(c). In context, therefore, we find that the prosecutor's comment responded to a defense attack on the victim's credibility, and constituted a challenge to the jury to instead find that the victim was credible on the basis of evidence before it, namely the witness's appearance, demeanor and actions while testifying. Prosecutors are accorded great latitude in their arguments; they may argue the evidence, as well as all reasonable inferences from the evidence as it relates to their theory of the case. *Bahoda, supra* at 282. So, the prosecutor may properly argue that a witness is believable on the basis of the evidence. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Next, defendant contends that the prosecutor improperly argued:

. . . And do not let [the victim] be re-victimized during the course of your deliberations. Do not let them re-victimize her again. She was already victimized once.

\* \* \*

. . . She told Frank, she told her grandmother, she reported it to the police, she told a nurse, she told a doctor, she has subjected herself to scrutiny. To have to sit in a courtroom and see the person who did that to you, who raped you, ladies and gentlemen. Put yourself in her shoes.

Again, these comments countered attacks on the victim's credibility by defense counsel in his closing argument to the jury. An otherwise improper comment by the prosecutor might not require reversal if it was in response to issues raised by the defense. *Callon, supra* at 330. Further, we must view the prosecutor's comments in the context of the evidence admitted at trial and the parties' arguments and theories. *Bahoda, supra* at 282; *Thomas, supra* at 454.

Here, defense counsel in closing argument acknowledged that the 16-year-old victim was young and looked young, "but she's not quite living that way," implying that evidence of the victim's drinking and other inappropriate behavior rendered her testimony either unworthy of belief or that what occurred was the result of the victim's own choices. Further, counsel argued that although defendant exercised poor judgment by engaging in unprotected sex with the victim, defendant still deserved "equal protection under the law." In arguing that the victim was not truthful, defense counsel suggested that the jury ask itself, "Why would the victim take the stand and testify as she did?" Defense counsel theorized that the victim first told her friend Frank, then

her grandmother, the police, medical personnel, “and it’s like the snowball going downhill. It starts to build up speed or it’s like the fish story, and every time you tell it, it gets bigger.”

The prosecutor responded to these defense arguments regarding the victim’s poor choices and equal protection of the law, by arguing:

When we talk about that concept of equal protection of the laws, ladies and gentlemen, I would ask you - - or I would tell you that [the victim] deserves equal protection of the laws despite the fact that she was intoxicated at 16 and despite the fact that she was in the wrong place at the wrong time. And don’t forget that the reason why we are here at this trial is not because of the choices that [the victim] made, it’s because of the choices that this Defendant made, ladies and gentlemen. It’s because of what he did that led us all into this courtroom. And do not let [the victim] be re-victimized during the course of your deliberations. Do not let them re-victimize her again. She was already victimized once.

The first part of the prosecutor’s comments is clearly a fair response to defense counsel’s argument. *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). As to the comments regarding “re-victimization,” we agree that it is improper for a prosecutor to argue that a jury convict as part of its “civic duty,” *Bahoda, supra* at 282, or to ask a jury to decide a case on the basis of sympathy or prejudice, *Watson, supra* at 591. But viewed in context, we conclude that rather than shifting the focus of the jury to the extraneous matters of sympathy, prejudice, or civic duty, the prosecutor in her argument sought to re-direct the jury’s focus to the defendant’s choices and to the critical issue of the case: whether the sex act with the victim was coerced or consensual. Clearly the prosecutor’s comment conveyed the message that she believed the victim’s version of events was truthful. But this argument merely restated the prosecutor’s theory of the case. Arguments regarding credibility are not improper when based on the evidence, even if couched in terms of belief. *People v Jansson*, 116 Mich App 674, 693-694, 323 NW2d 508 (1982). We find that is what occurred here when the prosecutors comment is viewed in the context of the prosecutor’s theory, the defense attack, and the prosecutor’s comments that immediately followed: that the victim’s appearance, demeanor, and actions while testifying demonstrated that the victim was credible.

Our conclusion that on rebuttal the prosecutor generally argued that the evidence showed the victim was credible is further confirmed by the prosecutor’s response to the defense’s “fish story” argument. The prosecutor contended that it would have been easier for the victim “not to report this, not to go forward.” Further, although the victim repeatedly told others what happened and underwent an invasive investigation, “[s]he was consistent throughout.” Thus, the prosecutor asked the jury to find the victim credible, not based on sympathy, but on evidence of consistency and lack of motive to fabricate. The prosecutor argued:

She was consistent throughout. Easiest thing for her to do would be to say it didn’t happen. She wasn’t expected home that night. And it’s not, it’s not a juror’s responsibility to figure out a reason why she would lie when there has been no reason presented. She wasn’t expected home and she was consistent. She told Frank, she told her grandmother, she reported it to the police, she told a nurse, she told a doctor, she has subjected herself to scrutiny. To have to sit in a

courtroom and see the person who did that to you, who raped you, ladies and gentlemen. Put yourself in her shoes.

This argument did not “hit below the belt.” In essence, the prosecutor asked the jury to rationally assess the victim’s credibility on the basis that her version of events remained consistent and survived the crucible of courtroom cross-examination. “Put yourself in her shoes” was not a call for sympathy, or for the jury to empathize with the victim; it was simply a method of pointing out the difficulty of appearing as a witness in court as a factor bearing upon the victim’s credibility, i.e., it would have been easier for the victim “to say it didn’t happen.” Although the prosecutor must ensure an accused receives a fair trial, she is also an advocate and need not state arguments based on the evidence or reasonable inference therefrom in bland, sterile, or unemotional language. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996); *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989).

Because we find that the prosecutor’s arguments were proper, we do not find any plain error that affected defendant’s substantial rights. *Carines, supra* at 774; *Callon, supra* at 229. Moreover, even if error occurred, it was not outcome-determinative so as to merit reversal. “Juries are presumed to follow their instructions.” *People v Rodgers*, 248 Mich App 702, 717; 645 NW2d 294 (2001). The trial court’s instructing the jury to decide the case based only on the evidence properly admitted during the trial and that attorney’s comments are not evidence cured any prejudice from the prosecutor’s brief remarks. *Bahoda, supra* at 281.

We also reject defendant’s claim of cumulative error. While several errors that are not individually prejudicial may, when considered as a whole, require reversal, *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003), we have found no errors here. Having found no errors they cannot combine to require reversal. *Id.*; *Bahoda, supra* at 292, n 64. Moreover, even if we were to conclude the prosecutor made more than one improper remark, we would still conclude reversal is not warranted for the reasons stated *supra*. *Id.* at 281.

Next, defendant argues that using offense variables in Michigan’s sentence guidelines to impose a minimum sentence in excess of that determined solely by reference to his conviction and prior criminal record violates his Sixth Amendment right to a have a jury determine beyond a reasonable doubt, any fact, other than that of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum. *Blakely v Washington*, 542 US \_\_\_\_; 124 S Ct 2531, 2536; 159 L Ed 2d 403 (2004), citing *Apprendi v New Jersey*, 530 US 466, 490, 147 L Ed 2d 435, 120 S Ct 2348 (2000). But our Supreme Court has already held that *Blakely* does not affect Michigan’s sentencing guidelines scheme, in which prior record variables and offense variables are utilized to arrive at a recommended minimum sentence range. *People v Claypool*, 470 Mich 715, 730 n 14 (Taylor, J.), 732 (Corrigan, C.J.), 744 (Weaver, J.), 744 n 1 (Young, J.); 684 NW2d 278 (2004). Furthermore, this Court has rejected the argument that *Claypool* is not binding on this Court. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881; 693 NW2d 823 (03/31/05).<sup>1</sup>

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<sup>1</sup> The Court limited leave granted to “the issue whether *Blakely*[.] . . . and *United States v Booker*, 543 US \_\_\_\_; 125 S Ct 738; 160 L Ed 2d 621 (2005), apply to Michigan’s sentencing (continued...)

Moreover, our review of *Blakely*, and *United States v Booker*, 543 US \_\_; 125 S Ct 738; 160 L Ed 2d 621 (2005) (applying *Apprendi* and *Blakely* to federal sentencing guidelines), convinces us that those cases do not affect Michigan's sentencing guidelines which provide a recommended range for a minimum sentence in an indeterminate sentence that has its maximum fixed by the Legislature and a jury's finding of guilt beyond a reasonable doubt. *Blakely*, *supra*, 124 S Ct at 2538; *Booker*, *supra*, 125 S Ct at 749-750. "[W]hen a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *Id.* at 750. See, e.g., *McMillan v Pennsylvania*, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986) (judicial fact finding - - visible possession of a firearm - - to set a mandatory minimum sentence does violate the Sixth Amendment right to jury trial), and *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002). As the Supreme Court explained:

Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion - - and rely upon judicial expertise - - by requiring defendants to serve minimum terms after judges make certain factual findings. [*Id.* at 567.]

In the present case, defendant on appeal has abandoned the argument he raised below that record evidence did not support the trial court scoring OV-4 at 10 points, MCL 777.34(1)(a) (serious psychological injury to the victim requiring professionals treatment), or OV-8 at 15 points, MCL 777.38(1)(a) (asportation or captivity increasing the danger to the victim).<sup>2</sup> See *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), lv gtd on other issues 471 Mich 913; 688 NW2d 509 (2004): "[W]e will uphold the trial court's guidelines scoring if there is any evidence to support it." Accordingly, we must conclude that defendant's minimum sentence of 290 months imprisonment was within the appropriate guidelines recommended range of 87-290 months, grid IV-F of MCL 777.63, as enhanced because of defendant's status as a fourth felony offender, MCL 769.13; MCL 777.21(3)(c). We are, therefore, required to affirm defendant's sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

We affirm.

/s/ David H. Sawyer  
/s/ Jane E. Markey  
/s/ Christopher M. Murray

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(...continued)

scheme.

<sup>2</sup> Defendant has also abandoned an unpreserved challenge to the trial scoring OV-10 at 10 points, MCL 777.40(1)(b) (exploitation of the victim's vulnerability). MCL 769.34(10); MCR 6.429(C); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).